

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs March 19, 2008

STATE OF TENNESSEE v. ARDIE MAE CULBREATH

Appeal from the Criminal Court for Wilson County
No. 05-0068 John D. Wootten, Jr., Judge

No. M2007-01157-CCA-R3-CD - Filed July 21, 2008

The defendant, Ardie Mae Culbreath, pled guilty to theft of property valued at \$10,000 or more but less than \$60,000, a Class C felony. See T.C.A. §§ 39-14-103 (theft of property); -105 (grading of theft offenses). She was granted judicial diversion, subject to her successful completion of three years of probation and making restitution of \$10,000. In this appeal, the defendant argues that the trial court erred in establishing the restitution amount without sufficient proof of the victim's losses and without considering her financial resources and future ability to pay. The state argues that the trial court erred in not awarding the full amount of restitution the victim sought, \$16,020. We hold that the trial court was permitted by Code section 40-20-116(a) to set restitution at \$10,000 but that it failed to consider the victim's losses and future ability to pay in setting this restitution amount as a condition of probation, contrary to Code section 40-35-304. We affirm in part and remand the case for further consideration.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed in Part,
Reversed in Part, Case Remanded**

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and JOHN EVERETT WILLIAMS, JJ., joined.

Comer L. Donnell, District Public Defender, and Shelley J. Thompson, Assistant Public Defender, for the appellant, Ardie Mae Culbreath.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Tom P. Thompson, Jr., District Attorney General; and Robert N. Hibbett, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The defendant and a co-worker stole scratch-off lottery tickets from their employer, Cedar Forest Market, over a period of several months in 2004. The owner of the market, Ray Patton, became suspicious when his bank account related to the market's lottery money was consistently

deficient of funds, and he discovered the source of the problem after installing additional video surveillance at the store.

At the sentencing hearing, Mr. Patton testified that he believed his losses from the defendant's and the co-defendant's actions to be over \$26,000 and that he had received \$10,000 from his insurance company. He stated that he had lost sales commissions of \$10,178.84 and that he had made special deposits of over \$16,020 to account for shortages in his lottery account. He requested restitution of \$16,020. He provided records from his business consisting of his own documentation, reports and receipts from the Lottery Commission, deposit slips, and bank statements, which were received as exhibits. He admitted, however, that some of his record keeping was not done on a daily basis and that the loss figures he provided included some commissions from lottery sales that were not related to the same lottery games for which the defendants stole tickets. After he was unable to provide specific details about his loss figures, Mr. Patton said, "Let's let the lottery straighten that out," and conceded that he might have provided an inaccurate total for the lost commissions.

Hosea Carter, the director of retail sales and customer operations for the Tennessee Lottery, testified about the procedures that are followed when a retailer activates a pack of scratch-off lottery tickets with regard to the Lottery's collection of payment from the retailer and its payment of commissions to the retailer. He testified that the Lottery had not audited Mr. Patton's business or otherwise determined the amount of the loss from the defendants' actions. He identified the sales commission summary that had been provided by Mr. Patton in his testimony and stated that the commissions reflected on the summary were for all of Mr. Patton's store's lottery sales, not just the lost commissions from the defendants' thefts. He said that lottery officials might be able to tell whether fraudulent activity was occurring if a retailer kept good records, but that "[t]here really is no possible way" for them to determine lost commission from stolen tickets.

At the conclusion of the proof, the trial court found that the state had failed to prove the amount of the victim's loss but that it could set restitution at \$10,000 because the defendant's guilty plea to theft of at least \$10,000 but not more than \$60,000 amounted to the defendant's acknowledgment that the state had sufficient proof to establish the crime beyond a reasonable doubt. Therefore, the court ordered restitution of \$10,000.

On appeal, the defendant complains about the trial court's method of setting restitution but does not suggest an amount which she believes is appropriate. She requests that the court modify the restitution order or remand the matter for a further hearing. The state argues that the trial court should have awarded the full \$16,020 requested and asks that this court modify the restitution order to that amount or remand for rehearing. We reject the positions of both parties and hold that the trial court's setting the restitution amount at \$10,000 was not error pursuant to Code section 40-20-116(a) but that the trial court failed to consider the defendant's financial resources and future ability to pay, requiring that we remand the case.

Generally, restitution may be ordered as a component of sentencing pursuant to Code sections 40-35-104(c)(2) and 40-35-304. Additionally, in theft cases, restitution is mandated:

Whenever a felon is convicted of stealing or feloniously taking or receiving property, or defrauding another of property, the jury shall ascertain the value of the property, if not previously restored to the owner, and the court shall, thereupon, order the restitution of the property, and, in case this cannot be done, that the party aggrieved recover the value assessed against the prisoner, for which execution may issue as in other cases.

T.C.A. § 40-20-116(a). Section 40-20-116(a) contemplates restitution to the victim of the property itself or the value of the property, whereas section 40-35-304 allows restitution for the victim's "pecuniary loss," consisting of special damages and out-of-pocket expenses incurred by the victim relative to investigation and prosecution of the crime. Section 40-35-304 also states that in determining a proper amount and method of payment of restitution, "the trial court shall consider the financial resources and future ability of the defendant to pay or perform." T.C.A. § 40-35-304(d). If the trial court determines that the proper restitution amount pursuant to section 40-35-304(d) is less than the amount established by the jury under section 40-20-116(a), the court should establish the deficiency amount, which is collectable by execution. See T.C.A. § 40-20-116(a); State v. Patricia White, No. W2003-00751-CCA-R3-CD, Gibson County (Tenn. Crim. App. Oct. 15, 2004) (relying on State v. Charles Chesteen, E1999-00910-CCA-R3-CD, Cocke County (Tenn. Crim. App. June 8, 2000)).

In the present case, it is not apparent whether the trial court contemplated its duties pursuant to section 40-20-116(a), as well as section 40-35-304(d). However, we hold that the trial court had the authority under section 40-20-116(a) to establish restitution of \$10,000 based upon the defendant's admission in her guilty plea that she had stolen at least \$10,000 from the victim. By pleading guilty, the defendant waived her right to a jury trial and admitted the facts necessary to constitute the crime. See, e.g., State v. Mackey, 553 S.W.2d 337, 339-40 (Tenn. 1977) (recognizing that defendant waives right to jury trial by entering a guilty plea); Ellis v. Carlton, 986 S.W.2d 600, 602 (Tenn. Crim. App. 1998) ("When a defendant pleads guilty, he waives the requirement that the State be required to prove each element of the offense beyond a reasonable doubt.").

With respect to restitution allowed by section 40-35-304, the trial court found that the evidence did not support a conclusion that the victim's loss was the full amount he claimed and that an exact amount for the loss had not been established by the evidence. The trial court's findings in this regard are supported by the record. On appeal, the state argues that the victim's "uncontested testimony" was sufficient to establish the loss. However, the victim's testimony about the \$16,020 he sought in restitution related to the amount of his deposits to keep his lottery bank account afloat. Money was taken from this account to pay for all of the scratch-off lottery tickets, not just the ones stolen by the defendant and her co-defendant. Money was also deposited to this account for commissions from all lottery tickets. The victim did not testify whether he made additional deposits into the account to pay for the scratch-off lottery tickets that were not stolen or whether his deposits for account shortfalls were only for the stolen tickets. The victim admitted other shortcomings in his record keeping and estimation of his loss. The testimony of the lottery official did not provide

a figure for the victim's loss. The trial court did not err in finding that the evidence was not sufficient to support a finding that the victim's loss was \$16,020.

The record does not reflect that the trial court made any findings about the defendant's financial resources and future ability to pay, despite the fact that the record contains a financial affidavit with detailed information about the defendant's sources of income, monthly expenses, and family obligations, and the presentence report with similar information. Thus, before establishing the final restitution amount at \$10,000, the trial court should have considered whether this was a reasonable restitution amount to be ordered as a condition of the defendant's probation. The case must be remanded for the court to make that determination.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed in part, and the case is remanded for the trial court to determine whether \$10,000 is a reasonable amount of restitution given the defendant's financial resources and future ability to pay.

JOSEPH M. TIPTON, PRESIDING JUDGE